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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 935

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, and SWITCHMEN'S UNION OF NORTH AMERICA,
Petitioners,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN, AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, ET AL. *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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OCTOBER TERM, 1963

No.

Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Railroad Trainmen, and Switchmen's Union of North America, *Petitioners*,

v.

Certain Carriers Represented by the Eastern, Western, and Southeastern Carriers' Conference Committees, Chicago, Burlington & Quincy Railroad Company, The Denver and Rio Grande Western Railroad Company, Chicago and North Western Railway Company, Missouri Pacific Railroad Company, Southern Pacific Company, Union Pacific Railroad, Seaboard Air Line Railroad Company, The New York Central Railroad Company, The Baltimore & Ohio Railroad Company, Richmond, Fredericksburg, and Potomac Railroad Company, The Chesapeake and Ohio Railway Company, Atlantic Coast Line Railroad Company, the Pennsylvania Railroad Company, individually and as representative of certain other carriers, Ralph T. Seward, individually and as representative of Arbitration Board No. 282, Robert F. Kennedy as Attorney General of the United States and the United States, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Railroad Trainmen, and

the Switchmen's Union of North America, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on February 20, 1964, Court of Appeals Nos. 18,331 and 18,332.

OPINIONS BELOW

The opinion of the Court of Appeals and the opinion of Judge J. Skelly Wright concurring in part and dissenting in part (Appendix A, *infra*) have not yet been officially reported. They are unofficially reported in 55 LRRM 2517. The opinion of the District Court (Appendix C *infra*) is reported in 225 F. Supp. 11 (1964).

JURISDICTION

The judgment of the Court of Appeals was entered on February 20, 1963, and is appended hereto as Appendix B *infra*. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a federal district court of one judge had jurisdiction to enter final judgment in a suit to enjoin on grounds of repugnance to the Constitution of the United States the enforcement, operation and execution of a federal statute and the award of an arbitration board rendered thereunder.

2. Whether Question 3 listed below presents substantial constitutional issues for the purpose of convening a three-judge federal district court.

3. Whether Public Law 88-108, as construed by the courts below, or the award issued thereunder, deprives

employees of liberty or property without due process of law by taking away their rights under existing collective bargaining agreements and their right to strike and requiring them to accept instead terms and conditions of employment fixed by an *ad hoc* arbitration board, in that, (a) the employees never agreed to the arbitration nor the award issued, (b) the arbitration board was not established by Congress as a regulatory administrative agency and did not meet the constitutional requirements for such an agency to which Congress could (if it had purported to do so) delegate the legislative power inherent in the establishment of terms and conditions of employment by government decree, and (c) the action of the board was not subjected to constitutionally requisite judicial review.

4. Whether Public Law 88-108 confined the jurisdiction of the arbitration board to finding and including in its award all agreements of the parties and deciding only the points of disagreement remaining after the issues had been narrowed by the agreements reached during the prior negotiations.

5. Whether the award of the arbitration board exceeded the jurisdiction conferred on the board because the board ignored agreements of the parties, resolved issues which had already been resolved by agreements of the parties during the prior negotiations, and included in its award decisions differing materially from agreements made by the parties.

6. Whether the courts should set aside the award because it is not based on findings of fact concurred in by a majority of the arbitration board or because the findings of the neutral members are not supported by substantial evidence.

7. Whether the award of the arbitration board exceeded the jurisdiction conferred on the board by redelegating to special boards of adjustment the determination of crew consist in yard service and on branch lines in road service, instead of the arbitration board itself making the determination.

STATUTES INVOLVED

Public Law 88-108, 77 Stat. 129, is set forth in Appendix D, *infra*. The relevant provisions of the Railway Labor Act, 45 U.S.C., 151 *et seq.* 48 Stat. 1185, are set forth in Appendix E, *infra*. Section 13 of the Railway Labor Act of 1926, 44 Stat. 577, 587 is set forth in Appendix F, *infra*. 28 U.S.C. 1254(1), 62 Stat. 928, together with earlier statutes showing the relevant legislative history, is set forth in Appendix G, *infra*.

STATEMENT

This Court in the case of *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad*, 372 U.S. 284 (1963), had before it an earlier aspect of the dispute between the carriers and the petitioners, which is still unresolved and as to part of which the present case presents a later effort at resolution.

The two cases decided by the courts below which petitioners now seek to bring before this Court for review are: one case docketed in the District Court as Misc. No. 41-63 and in the Court of Appeals as No. 18,331, consisting of the proceeding in which the award of Arbitration Board No. 282 (JA 8-29)[1] was filed in

[1] "JA" denotes the "Consolidated Joint Appendix" as filed in the Court of Appeals. One certified and nine uncertified copies have been filed with the Clerk of this Court for use in the consideration of this petition for a writ of certiorari.

the office of the Clerk of the District Court in conformity with Section 9 of the Railway Labor Act (Appendix E, *infra*); another case docketed in the District Court as Civil Action No. 2919-63 and in the Court of Appeals as No. 18,332 instituted by the filing in the District Court of a "Petition to impeach and contest award of Arbitration Board, for declaratory judgment, and for injunctive relief" (JA 271 A-271-O).

The award of Arbitration Board No. 282 (JA 8-29) was rendered pursuant to Public Law 88-108, (Appendix D, *infra*) enacted by Congress on August 28, 1963, for the express purpose of avoiding a strike over various issues in dispute between petitioners and the carriers. Section 1 of said public law forbade a strike over any matters in dispute under notices served by the carriers on November 2, 1959 and notices served by petitioners and other labor organizations on September 7, 1960. Section 2 provided for the establishment of an arbitration board to be composed of seven members, two to be named by the carriers, two by the labor organizations, and the other three to be selected by the four members chosen by the parties or in the event they cannot agree, then the three additional members to be named by the President. Section 3 directed the Secretary of Labor to furnish the arbitration board with copies of his statement to the parties of August 2, 1963, together with memorandums and other data setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement as to matters on which there was no tentafive agreement.

Section 3 further provided that the arbitration board should make a decision as to what disposition should be made of those portions of the carriers' no-

tices of November 2, 1959 and the organizations' notices of September 7, 1960, dealing with the firemen issue and the train crew consist issue. The arbitration board was directed to incorporate in its decision any matters as to which it finds the parties were in agreement and to resolve matters on which the parties were not in agreement. Section 4 provided that the arbitration shall be conducted and the award made and filed pursuant to Sections 7, 8 and 9 of the Railway Labor Act.

The arbitrators named by the parties having been unable to agree, the President named the three neutral members of the arbitration board, designated as National Mediation Board Arbitration Board No. 282. The Arbitration Board conducted hearings in which the petitioners and the two other labor organizations representing operating employees and representatives of some 200 railroads, including most of the major railroads in the United States, participated (JA 35).

The Secretary of Labor, in accordance with the provisions of Section 3 of Public Law 88-108 (Appendix D, *infra*), on September 23, 1963 provided Arbitration Board No. 282, with two documents each entitled "Memorandum," dealing respectively with "The Firemen (Helpers) Issue" (JA 133-139) and "The Crew Consist Issue" (JA 225-228), which detailed negotiations of the parties with respect to an August 2, 1963 proposal for settlement made by the Secretary of Labor, summarized the extent of agreement, tentative agreement, and disagreement which developed, and

transmitted as attachments relevant exhibits (JA 140-224, 229-271).[2]

On November 28, 1963, Arbitration Board No. 282 filed an award made by the three neutral members and concurred in by the two carrier members (JA 8-29). The three neutral members filed an opinion in support of the award (JA 31-88). The two carrier members did not concur in any respect in the opinion of the neutral members but filed a separate statement expressing their disappointment in the award (JA 89-91). There were no findings of fact made formally and if any of the statements in the opinion of the three neutral members could be treated as findings, none of these statements received the concurrence of a majority of the seven members of the Arbitration Board.

With respect to the firemen issue the award provided that within seven days following the effective date of the award, each carrier covered by the award shall have the right to give the local chairman of the firemen on each seniority district, lists of the engine crews, within his respective seniority district, which in the carrier's judgment "based on considerations of safety, undue work burden, and adequate and safe

[2] Among other things he showed agreement that firemen jobs be abolished only when a vacancy required a new hire and no danger or undue burden ensued, the sequence in which agreed-upon categories of jobs should be abolished, categories of jobs not requiring case by case review of safety or burden and determination as to the safety or burden as to other jobs by special boards of adjustment (JA 137-138, 141-45). Although reporting disagreement as to the reviewability of yard crews (JA 227-228) he attached a carrier-prepared statement of position dated August 11, 1963 stating carrier agreement to nonreviewability of yard crews of one conductor and two brakemen (JA 260-264, Tr. 4801-4802).

transportation service" do not require a fireman (JA 12). Within thirty days thereafter, each local chairman shall have the right, based on like considerations, to designate not more than 10 percent of engine crews listed by the carrier as crews in which the carrier shall be required to continue to use a fireman (JA 12-13). At three-month intervals following the date of the carrier's original lists, carriers may give additional such lists and in turn the local chairmen may give such counter lists (JA 13-14). After the expiration of 37 days following the effective date of the award, carriers are not required to use firemen in freight or yard service other than in the crews designated by local chairmen as provided in the award except as necessary to provide jobs for firemen whose employment rights are retained under other provisions of the award and except that no yard locomotive is to be operated without a fireman unless it is equipped with an effective dead man control (JA 14). The award did not provide for any review of the carrier's listings, except that it allowed 10 percent of each list to be cancelled by the union.

With respect to employment rights of firemen the award completely wiped out all employment rights of firemen with less than two years seniority and of firemen with more than two years seniority who earned less than $200 during the preceding two years and restricted the employment rights of other firemen by requiring firemen of less than ten years seniority to lose all employment rights unless they accept any comparable job offered them by the carrier in any seniority district and by depriving firemen of more than ten years seniority of jobs which the carrier may discontinue pursuant to the award if other employ-

ment in any class of engine service for which they are qualified is available to them in their respective seniority districts (JA 19-20).

With respect to the train crew consist issue, the award required the carriers and the organizations to submit to decision by a special board of adjustment to be established for each job, disputes which may from time to time arise as to the number of trainmen to be employed in road service where the present practice or rule requires more or less than two trainmen, as to the number of trainmen to be employed on branch lines, and as to the number of brakemen or helpers to be used in yard service (JA 22-23). The award wiped out all rights of furloughed trainmen or brakemen whose jobs were found unnecessary by the special boards of adjustment and restricted the rights of other trainmen or brakemen whose jobs were found to be unnecessary by requiring each of them to take other available employment in his seniority district for which he is qualified (JA 27-28).

The petition in No. 18,332 (JA 271 A—271 O) was filed by the parties who are petitioners here. These organizations represent locomotive firemen, trainmen and brakemen employed by the railroads named as defendants and the other railroads represented by the defendant railroads (JA 271 A). The chairman of Arbitration Board No. 282 and the Attorney General of the United States were also named as defendants (JA 271 B, 303, 368). The petition was in two counts. Count I (JA 271 A—271 G) contained a statutory impeachment proceeding filed pursuant to Section 4 of Public Law 88-108 (Appendix D, *infra*) and Section 9, Second of the Railway Act (Appendix E, *infra*) to set aside the award of Arbitration Board

No. 282 as invalid because it was in excess of the jurisdiction and authority conferred on the board in that the award failed to include agreements reached by the parties, resolved matters on which the parties were not in disagreement, resolved some of them in a manner contrary to the agreement of the parties and as to others directed the parties to submit to further compulsory arbitration (JA 271 E—271 G). The petition alleged that the parties had agreed jobs should be eliminated by the process of attrition whereas the award provided for the elimination of jobs other than through attrition (JA 271 E); that the parties had agreed to seven matters concerning the elimination of firemen jobs whereas the award did not include any of these agreements (JA 271 F); that the parties had agreed to the nonreviewability of yard crews of one conductor and two brakemen whereas the award made such jobs reviewable (JA 271 F—271 G); that the parties had agreed that the compensation and expenses of the neutral members of special boards of adjustment should not be borne by the parties whereas the award imposed such expense and compensation on the parties (JA 271 F); that instead of resolving disagreements as to train crew consist, the award required both areas of disagreement as well as areas in which the parties had agreed to be submitted to further compulsory arbitration by special boards of adjustment (JA 271 E).

Count II (JA 271 G—271 K) sought a declaration of the constitutional invalidity of Public Law 88-108 under the Fifth Amendment to the Constitution of the United States and injunctive relief against the operation, execution or enforcement of Public Law 88-108 by putting the award in effect, if the award

was not impeached and set aside as prayed in Count I. It is alleged that Public Law 88-108 is enforceable by the Attorney General (JA 271 G) and compelled the petitioners and the employees they represent to submit to binding arbitration terms and conditions of employment, without their consent (JA 271 H); that the arbitration board established by said law had issued an award making drastic revisions without the consent of employees in the terms and conditions of employment contained in collective bargaining agreements now in effect (JA 271 H); and that hundreds of employees represented by petitioner face "imminent loss of their jobs, and the vested contractual seniority rights of many other employees will be impaired with loss of job opportunities and diminished ability to maintain earnings" (JA 271 I). The petition alleges that unless an injunction issues the employees are threatened with "imminent and irreparable" invasion of rights protected by the Constitution of the United States (JA 271 J).

The United States moved for and was granted leave to intervene as a party defendant in Civil Action No. 2919-63.

Answers were filed by all the defendants denying a number of the allegations of the petition (JA 272-278, 298-303). Both the carriers and the United States in their answers admitted that the award provided for the elimination of jobs otherwise than through attrition (JA 274, 299). The carriers likewise admitted that the arbitration board did not incorporate in its award all of the provisions of the agreement and tentative agreement respecting the submission of certain matters to special boards of adjustment with the costs and expenses of the neutral member to be assumed by

the National Mediation Board (JA 274) and that the guidelines for the special boards of adjustment which were provided in the award differed in some respects from those tentatively and qualifiedly agreed upon by the parties (JA 274-275).

Motions for summary judgment were filed by the petitioners and by all the defendants (JA 311-313).

A motion for the convening of a three-judge district court pursuant to 28 U.S.C. Sec. 2282 was duly made by the petitioners (JA 310, 326).

A one-judge district court denied the motion for a three-judge court (JA 329) and granted the motions of the defendants for summary judgment in the defendants' favor dismissing the action (JA 393).

The denial of the motion for the convening of a three-judge district court was initially based only on the ground that a three-judge court "is required only where an injunction is sought against a government agency to restrain that agency from enforcing a statute claimed to be unconstitutional." (JA 321). Later in the formal opinion of the court this action was described as based "on the ground that the action was not for an injunction, but for a decree impeaching and setting aside the award and that the prayer for an injunction was surplusage" (JA 386). Later still in the opinion, the court also stated that the "court would have been justified in denying the motion for the convening of a three-judge court on the ground that no substantial constitutional question is presented, as well as on the procedural ground on which it acted" (JA 391).

The court held that its scope of judicial review was "exceedingly limited and narrow" (JA 378); that it

could "consider only whether the award conforms to the requirements" of Public Law 88-108 (JA 378); that it could not review the substantiality of the evidence (JA 378), that the "findings are not subject to review" (JA 383), but that, in any event, petitioners had not shown "that any specific finding of fact is not supported by substantial evidence" (JA 379) or that any finding was "erroneous" (JA 383).

With respect to the meaning of the provisions of Public Law 88-108 directing the Arbitration Board to incorporate in its award the agreements of the parties, the court held that the statute did "not command the board to adopt such agreements" (JA 381); that "the purpose of the clause was to point the attention of the board to any agreements reached in order that the board might give them due weight, but not to limit its discretion in arriving at a final decision" (JA 381-382); that "the board was not bound by agreements made by the parties" (JA 385). Accordingly, the court deemed it immaterial that the Arbitration Board did not include in its award the admitted agreement of the parties that the compensation and expenses of neutral members of special boards of adjustment be borne by the National Mediation Board (JA 385). In addition the court stated that this agreement of the parties was "a nullity" because no one is authorized to bind the National Mediation Board to make such payments (JA 385).

The court rejected the contention that the board did not comply with the direction in Section 3 of Public Law 88-108 to the Arbitration Board to make a complete and final disposition of the dispute when instead of resolving the crew consist issue, the award provided for future compulsory arbitration of this

issue on a job by job basis by numerous special boards of adjustment. The court held that the Arbitration Board had "constructed machinery for the disposition" of the issues and that the construction of such machinery "must be deemed in essence to constitute a complete and final disposition of the issues" (JA 384).

The attack on the constitutionality of Public Law 88-108 was rejected on the ground that compulsory arbitration is not an innovation but rather the Railway Labor Act, by the creation of the National Railroad Adjustment Board, has "provided for compulsory arbitration of minor disputes" as far back as 1926 and "countless proceedings of this nature have been conducted under it over the years" (JA 389).

Public Law 88-108 was held to constitute a proper delegation by Congress of legislative power (JA 388-389). Adequate standards for the exercise of this delegated legislative power were found by the district court in the provisions of Section 7 that the Arbitration Board should give due consideration to the effect of the proposed award upon "adequate and safe transportation service to the public" and upon the "interests of the carrier and employees affected" giving "due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation" (JA 390).

On appeal, the court of appeals affirmed in a per curiam opinion with Judge Wright concurring in part and dissenting in part (Appendix A, *infra*). Affirmance was predicated on the opinion of the district court. The majority of the court added that a three-judge district court was not required because of a

supposed absence in the pleadings of any allegation that enforcement of the unconstitutional statute is threatened or imminent and because of a supposed stipulation of the parties "that nothing would be done to effectuate the award before the termination of litigation". The majority of the court also held the denial of the three-judge court was proper because no substantial constitutional question was presented.

Judge Wright dissented as to the denial of a three-judge court, believing that the constitutional issues were clearly substantial.

REASONS FOR GRANTING THE WRIT

1. The One-Judge Court was Without Jurisdiction to Grant the Defendants' Motions for Summary Judgment and to Dismiss the Complaint

The decision below requires review by this Court in the exercise of its supervisory jurisdiction over the lower federal courts to confine them to the exercise of power strictly within their jurisdiction.

Count II of the complaint sought a declaration that P.L. 88-108 and the Award were unconstitutional, stated that its purpose was to obtain an injunction against the application of the Award (JA 271 G), and prayed for a preliminary injunction pending determination of plaintiffs' right to a permanent injunction. (JA 271 K). Since P.L. 88-108 provided that the Award should be put in effect, such an injunction would have restrained the operation of the statute.

28 U.S.C. § 2282 provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be

granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

The district court denied petitioners' motion for a three-judge court, stating that Section 2282 applied only to cases in which an injunction was sought against an agency or officer of the Government. (JA 321). None of the defendants opposed the convening of a three-judge court for any reason other than the alleged insubstantiality of the constitutional questions. That Section 2282 is not limited to cases in which an injunction is sought against an officer of the United States is apparent when one compares the language of that section with 28 U.S.C. § 2281, the parallel provision with respect to injunctions against the operation of a state statute. Section 2281 specifically limits its provision for a three-judge court to cases in which an injunction is sought "restraining the enforcement, operation or execution of any State statute *by restraining the action of any officer of such State* . . ." These italicized words are significantly omitted from Section 2282. Both sections were enacted the same day, use parallel language except for the words italicized above, and appear at 62 Stat. 968. Congress obviously and deliberately intended that section 2282 be not limited to cases seeking injunctions against federal officers or agencies. This Court has expressly held that this difference in language was deliberate, and that Section 2282 applies although none of the parties is a public officer. *Coffman* v. *Breeze Corp.*, 323 U.S. 316, 317-18 (1945).

Section 2282 therefore applies when an injunction is sought that would restrain the enforcement, opera-

tion, or execution of an Act of Congress for repugnance to the Constitution, regardless of who it is that would be restrained. Here the Attorney General was joined as a defendant (JA 271 G), because Section 7 (b) of P.L. 88-108 makes the obligations of the Act enforceable upon suit by the Attorney General.

Later, in its opinion, the district court described its refusal to convene a three-judge court, as based on the ground that the prayer for an injunction was surplusage and that the relief sought "was substantially in the nature of a declaratory judgment" (JA 386), relying on three cases, none of which is applicable. We discuss these cases briefly.

Int'l Ladies' Garment Workers' Union v. Donnelly Garment Co., 304 U.S. 243 (1938) has repeatedly been distinguished on this issue and was distinguished in *Coffman v. Breeze Corp., supra.* The *Donnelly* case, as has repeatedly been pointed out, did not involve an effort to restrain the operation of a federal statute; although the validity of a federal statute was drawn in question, that is not enough for a three-judge court. As this Court explained in the *Coffman* case, the injunction sought in *Donnelly* was not against operation of a statute, but was against a strike.

Thompson v. *Whittier*, 365 U.S. 465 (1961), sought not an injunction but the setting aside of a ruling of the Veterans Administration that the plaintiff was disqualified for a pension. *Thompson* v. *Whittier*, 185 F. Supp. 306 (D.C. D.C., 1960). This Court held only that a direct appeal to this Court did not lie since the three-judge court was not required.

In *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963) this Court held that a three-judge court was

not required (pp. 152-55) although the complaint as amended before the third trial contained a prayer for injunction, because injunctive relief had not theretofore been sought and was not pursued even in the third trial.

This Court indicated in *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713 (1962) that where a three-judge district court has been improperly denied it is a proper function of the Court of Appeals to correct the error and application to this Court for writ of mandamus is no longer the exclusive remedy.

A single-judge district court has no jurisdiction to make any order except to refer to a three-judge court any case to which Section 2282 is applicable. This is true irrespective of the merits of the case. In *Schneider* v. *Rusk*, 372 U.S. 224 (1963), this Court (at p. 225) held that the constitutional questions "were not plainly insubstantial" and held the single-judge district court "powerless" to dismiss the action on the merits. To the same effect see *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962); *Stratton* v. *St. Louis S.W.R. Co.*, 282 U.S. 10, 15 (1930); and *Wolf* v. *Boyd*, 9th Cir., 1961, 287 F. 2d 520.

Even if the constitutional question may not be reached in making a final decision, a three-judge court is required. The same is true even though the complaint fails to state a cause of action for injunctive relief or even a justiciable controversy. *Coffman* v. *Breeze Corp., supra; Florida Lime & Avocado Growers* v. *Jacobsen*, 362 U.S. 73, 76-85 (1960).

Although the court of appeals based its affirmance on the opinion of the district court, it added, with respect to the three-judge court requirement, that the

complaint was lacking in the essential allegation of threat or imminence of enforcement and that in fact it had been told that the parties had stipulated that nothing would be done before termination of this litigation. The court was mistaken in both respects.

The petition in the district court, after having alleged in detail the nature and extent of the invasion of rights of employees represented by the plaintiffs, alleges specifically in Count II, paragraph 13, that the theretofore alleged damage and injury and invasion of rights are imminent and irreparable. (JA 271 J). Although the answer of the carrier defendants denied generally the allegations of Count II, paragraph 13 of the petition, it stated in paragraph 14 that "the changes in terms and conditions of employment provided by the Award of the arbitration board will become effective as provided by law and in said Award" (JA 278).

There was a stipulation between one of the petitioners, the Brotherhood of Locomotive Firemen and Enginemen, and the carrier defendants, made after the district court decision as a substitute for seeking an interim stay of action under that decision, deferring action under the award adversely affecting the employment of firemen until ten days after the decision of the court of appeals. There is now a generally similar stipulation between the same parties deferring such action until ten days after this Court's action on this petition. The former stipulation was not mentioned in the court of appeals by counsel for either of the parties to it; the court apparently inferred its erroneous impression of it from a statement in argument of counsel for the United States, which was not a party

to it. The other two petitioners here have never been party to any such stipulation and in fact the carriers are currently proceeding under the award as to them.

2. The Constitutional Challenge to the Validity of P.L. 88-108 and the Award is Substantial for Purposes of Convening a Three-Judge Court

We do not elaborate this point here, since we show in the next point that the statute and award do in fact invade important constitutional rights.

3. This Case Presents an Important Question of Constitutional Law which Ought to be Decided by this Court

Count II of the petition in the district court attacks P.L. 88-108 and the award issued thereunder as invading rights which petitioners are guaranteed under the First and Fifth Amendments. (JA 271 G—271 J).

The issues here presented far transcend the invasion of the constitutional rights of the 200,000 employees represented in this case (JA 35). We believe Congress here abdicated its responsibility to determine the federal government's policy as to how employees adversely affected by technological advance shall be protected. Instead of laying down a federal policy, Congress in effect told the President to go get any three men he wanted to decide the case, if the parties could not agree on three men. Congress thus disposed of this problem in a manner inconsistent with our form of government. If Congress can do this with respect to a labor problem, a precedent for abdication as to any other issue will be established.

The violation of due process of law which inheres in the statutory scheme here adopted for the compul-

sory arbitration of the terms and conditions of employment is evident once it is realized that Congress by Public Law 88-108 imposed all the basic features of "arbitration" as that term is usually used, except the all important ingredient of consent of the parties,[3] and did not set up an administrative agency to determine terms and conditions of employment. Since arbitration by definition is the decision of a dispute by a person chosen by the parties with the intent to substitute an honest exercise of the arbitrator's uncontrolled discretion as to how the dispute should be decided for the available legal process,[4] arbitration imposed on the parties against their will is a contradic-

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[3] In *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582 (1960), this Court stated: "* * * arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." To the same effect see *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionery Workers*, 370 U.S. 254, 256-257 (1962); *Boyden* v. *Lamb*, 152 Mass. 416, 25 N.E. 609 (1890); *Franklin Needle Co.* v. *American Federation of Hosiery Workers*, 99 N.H. 101, 105 A. 2d 382, 384 (1954).

[4] Arbitration "is a contractual method for settling disputes in which the parties create their own forums, pick their own judges, waive all but limited rights of review or appeal, dispense with the rules of evidence, and leave the issues to be determined in accordance with the sense of justice and equity that they may believe reposes in the breasts and minds of their self-chosen judges." *Matter of Spectrum Fabrics Corp.*, 285 App. Div. 710, 714-715, 139 N.Y.S. 2d 612, 617, affirmed 309 N.Y. 709, 128 N.E. 2d 416 (1955).

"Broadly and generally speaking an arbitration is a contractual proceeding by which the parties to a controversy or dispute, in order to obtain a speedy and inexpensive final disposition of the matters involved, voluntarily select arbitrators or judges of their own choice and by consent submit the controversy to such tribunal for determination in substitution for the tribunals provided by the ordinary processes of the law." 6 C.J.S. Arbitration and Awards, § 1, p. 152.

tion in terms.[5] The use of the term "arbitration" in Public Law 88-108 served only to negative the applicability of legal principles and commit decision to the uncontrolled discretion of whomever should be chosen to serve as the Arbitration Board. Hence Public Law 88-108 substitutes a government by men for a government by laws. This violates due process of law. "For, the very idea that one man may be compelled to hold * * * the means of living * * * at the mere will of another, seems to be intolerable in any country where freedom prevails, as being, the essence of slavery itself." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886).

The courts below treated the case as presenting the issue of whether the government could constitutionally fix terms and conditions of employment and held that it could (JA 386-389, Appendices A and C, *infra*). None of the parties argued below that the government lacked this power in proper cases and under proper circumstances because it seemed so clear that whatever the powers of the government in this regard, those powers must be exercised either by Congress itself fixing the terms and conditions of employment as was done in the statute sustained in *Wilson* v. *New*, 243 U.S. 332 (1917) or by establishing an administrative agency, with all the legal protections which the Constitution requires. Committing the fixing of terms and conditions of employment to the arbitration process, but omitting the element of consent of the parties which is the essential ingredient for making arbitra-

[5] In *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 581 (1960), this Court quoted from Harry Shulman, Reason, Contract and Law in Labor Relations, 68 Harv. L. Rev. 999, 1016, that an arbitrator "is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept."

tion permissible, so clearly violates due process of law, as to obviate the necessity of considering to what extent, if at all, the Constitution permits Congress to abolish the right to collective bargaining, and to strike, by establishing another method of determining wages, hours and conditions of employment.

In the three state cases where the issue has been raised the state supreme courts in opinions written by distinguished jurists have held that statutes for the compulsory arbitration of terms and conditions of employment are unconstitutional as constituting the delegation of legislative power without adequate standards. *Van Riper* v. *Traffic Tel. Workers' Fed. of New Jersey*, 2 N.J. 335, 66 A. 2d 616, 9 A.L.R. 2d 854 (1949), opinion by Chief Justice Vanderbilt; *State ex rel. Everett Fire Fighters* v. *Johnson*, 46 Wash. 2d 114, 121, 278 P. 2d 662 (1955), opinion by Justice Schwellenbach; *Transport Workers Union* v. *Circuit Judge*, 322 Mich. 332, 348, 34 N.W. 2d 71 (1948), opinion by Chief Justice Bushnell. In the *Van Riper* case the Supreme Court of New Jersey stated (2 N.J. at pp. 353-354):

> "* * * in the absence of standards, the very term 'board of arbitration' carries with it the implication that the board will act in the way that arbitrators customarily act, not according to established criteria but according to the ideas of justice or of experience of the individual arbitrators. Anyone who has had experience with arbitration realizes that this is the inherent weakness of arbitration as a remedy. Unless standards are set up in any submission to arbitration the tendency to compromise and be guided in part by expediency as distinguished from objective considerations and real right is inevitable. This is especially dangerous in the case of an arbitration

where the rights of third parties, here the public, are concerned. * * *

"Standards of delegation are peculiarly required, moreover, where the legislature is enacting a new pattern of social conduct, *Panama Refining Co. v. Ryan*, 293 U.S. 388, 79 L. Ed. 446 (1935); A.L.A. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 79 L. Ed. 1570 (1935). * * *"

As a result of the foregoing decisions the states which have desired to provide for the determination of terms and conditions of employment by governmental agency where impasses in collective bargaining have threatened strike on public utilities, have established what in effect are administrative agencies subject to judicial review and governed by specific standards, such as the particular labor market both in terms of geography and industry to which they are to make comparisons in fixing terms and conditions and how far, if at all, they may depart from prevailing standards in that market. For a careful analysis of these statutes see Herbert R. Northrup and Richard L. Rowan, Arbitration and Collective Bargaining: An Analysis of State Experience, 14 Lab. Law Journ. 178, 187-188 (February 1963).

In Public Law 88-108, as construed by the courts below, Congress adopted "arbitration," not "administrative regulation" as the method of fixing wages. Congress made no requirement that the Arbitration Board make any findings of fact. The Arbitration Board in fact made none. The opinion of the three neutral members, while it disclosed the process of reasoning of these members, was not concurred in by a majority of the seven-man board. The adoption of the system of lists of firemen to be submitted by the

carrier and then cancelled out as to 10 percent by the union was not defended as a rational resolution of the firemen job issue. Rather it was a gimmick solution typical of arbitrators and indefensible by an administrative agency.

The decisions below are predicated on their holding that Congress intended the Arbitration Board to function as arbitrators function. The Arbitration Board so read their mandate (JA 32, 46) and did so function. The courts below in upholding the award even accorded the Arbitration Board a scope not afforded to arbitrators. They held that Congress did not intend the Arbitration Board to be bound even by such agreements as the parties had reached (JA 381-382, 385; Appendix C, *infra*). Thus, we here have not only arbitration without consent, but even as to the areas where the parties had agreed on terms, the arbitrators were free to disregard those agreements!

For more than eighty years operating employees on railroads have been protected by seniority contracts and by contracts specifying crew consist.[6] The courts have held that such contracts gave railroad employees, without regard to the number of their years of seniority, property rights in their jobs which would be protected by the courts.[7] Also, the right to bargain

[6] Ripley, William Z., Railway Wage Schedules and Agreements, in Report of the Eight-Hour Commission, December 29, 1917, pp. 270, 303, 307-16 352-353 (Gov't Pr. Off. 1918).

[7] *Evans* v. *Louisville & N.R. Co.*, 191 Ga. 395, 402, 12 S.E. 2d 611, 615 (1940); *McGee* v. *St. Joseph Belt Ry. Co.*, 232 Mo. App. 639, 110 S.W. 2d 389, 392 (1937); *Grand Lodge* v. *Mills*, 43 Ariz. 379, 401, 31 P. 2d 971, 980 (1934); *Washington Local Lodge No. 104* v. *Boilermakers*, 33 Wash. 2d 1, 67-68, 70, 203 P. 2d 1019, 1058-1059 (1949); *Fine* v. *Pratt*, 150 S.W. 2d 308, 312 (Tex. Cir. App., 1941); *Ledford* v. *Chicago M St. P. & P.R.R. Co.*, 18 N.E. 2d 568, 572-574, 298 Ill. App. 298, 312 (1939).

collectively and to support bargaining efforts by the right to strike are constitutionally protected rights which are destroyed by Public Law 88-108.

This Court in *Wilko* v. *Swan*, 346 U.S. 427, 435-436 (1953) had occasion to reject arbitration, even when agreed upon by the parties, because this Court regarded the extra-legal features of arbitration as unsuitable to the protection of the interests there at stake. This Court adverted to the arbitrators acting "without judicial instruction in the law;" "their award may be made without explanation of their reasons;" "the arbitrators' conception of the legal meaning of * * * statutory requirements * * * cannot be examined. Power to vacate the award is limited" (346 U.S. at 436). All of these defects and more too inhere in use of the arbitration process as a means of writing contracts governing terms and conditions of employment without the consent of the parties.

The fixing of terms and conditions of employment is a legislative process. Over the years Congress has been permitted to delegate the legislative power vested in it by Article I of the Constitution only where it established administrative agencies, set standards for the exercise of the delegated power, required findings of fact and other procedures which would enable courts to judge if the agency had observed the standards prescribed, and made the findings and awards subject to the usual judicial review, including the substantiality of the evidence. All of these constitutional requirements according to the courts below were ignored by Congress when it enacted Public Law 88-108.

Delegation without standards either makes judicial review impossible or imposes on the judiciary the leg-

islative task of creating standards. Even those who favor a relaxation of the requirement of standards, recognize that such delegation must be accompanied by a judicial review of the substantiality of the evidence to support the order. Kenneth Culp Davis, Administrative Law Treatise (1958), vol. 1, sec. 2.05, pp. 98-99; vol. 4, secs. 29.08-29.09, pp. 154-155, 164-170. *Cf. St. Joseph Stockyards Co.* v. *United States,* 298 U.S. 38, 51-52 (1936); Louis L. Jaffe, Judicial Review: Questions of Fact, 69 Harv. L. Rev. 1020, 1050 (1956). Public Law 88-108, as construed by the courts below, did not provide this standard of judicial review (JA 378, 383, Appendix C, *infra*).

4. This Case Presents Important Issues of Statutory Construction Which Admit of Decision Contrary to the Decisions Below so as to Avoid the Constitutional Issues Presented

Our discussion of point 3, above, has been based on P.L. 88-108 as construed by the district court, which construction the court of appeals adopted. This is a construction under which the arbitration board was not required to make, and did not make, any specific findings concurred in by a majority of the board, even what was called in the statute "finds" was left to the uncontrolled discretion of the board, the scope of judicial review was "extremely limited" (to the area provided for voluntary arbitrations), the award was not subject to review for substantiality of evidence, and even the explicit direction to incorporate into the award matters of agreement between the parties was construed to mean only that the board was "to consider and refer in its decision to any matters as to which it finds the parties were in agreement."

The 4th, 5th, 6th and 7th of the Questions Presented, *supra*, as well as Count I of the petition in

the district court, urge that a different construction of the statute be adopted, that the award be impeached accordingly, and that the constitutional issues be not reached. The grounds on which impeachment is sought, although brought within the provisions of Section 9 of the Railway Labor Act (Appendix E, *infra*) that "the award does not conform, nor confine itself, to the stipulations of "the governing statute(all involve construction of that statute, unlike proceedings for impeachment of an award pursuant to voluntary arbitration. This court should not, by confining its review to the jurisdictional and constitutional issues, deprive itself of the opportunity to avoid constitutional issues by construing a statute so as to be constitutional.

In the concuring and dissenting opinion of Judge Wright in the court below (Appendix A, *infra*) there is raised in another connection the suggestion that the issues going to impeachment are placed beyond this Court's review jurisdiction by the provision in Section 9, Sixth of the Railway Labor Act that the court of appeals decision "upon said questions shall be final." Further examination completely dispels any force of such a suggestion.

An analysis of the legislative history of 28 U.S.C. 1254 (1) shows that Congress intended to confer on this Court the power to review by certiorari, judgments of the courts of appeals issued under Section 9 of the Railway Labor Act despite the provision referred to by Judge Wright. Section 9 of the Railway Labor Act in its present form was enacted on May 20, 1926 (44 Stat. 585). Section 13 of the Railway Labor Act as enacted in 1926 expressly amended the Judicial

Code to include cases in a circuit court of appeals under Section 9 of the Railway Labor Act among the cases to which the certiorari provisions of Sections 239 and 240 of the Judicial Code should apply (Appendix F, *infra*). The 1934 amendments to the Railway Labor Act made no change either in Section 9 or Section 13 (48 Stat. 1197). The 1940 amendments to the Judicial Code, resulted in an express listing in 28 U.S.C. 348 (Appendix G, *infra*) of Section 9 of the Railway Labor Act as among the sections under which cases in the circuit courts of appeals were reviewable by the certiorari procedures of Section 346 and Section 347 of the Judicial Code. In 1948, the Judicial Code was again amended into its present form. 28 U.S.C. 1252, 1253, 1254 (Appendix G, *infra*). While the listing of specific sections was dropped, the legislative history establishes that existing law was preserved so as to retain the power of unrestricted review of cases certified or brought up on certiorari. The report of the Committee on the Judiciary of the House of Representatives on the bill which amended the Judicial Code stated that Section 348 was omitted because the "Section is superfluous as Section 1254 of this revision which was derived from Section 346 and Section 347 of Title 28 U.S.C., 1940 ed., referred to in this section, applies to any case in the circuit court of appeals." H. Rept. No. 308, 80th Cong., 1st Sess., on H.R. 3214, p. A236. Hence nothing in Section 9 restricts the power of this Court to review by certiorari all issues in this case.[8]

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[8] We have set forth in Appendix F, *infra*, Section 13 of the original Railway Labor Act, and in Appendix G, *infra*, the pertinent legislative history of 28 U.S.C. 1252.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Court should issue a writ of certiorari to review the decision below.

Respectfully submitted,

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